Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DOUGLAS BAUGHER, ET AL.,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Third Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CORINNE LEE MURPHY
Deputy Attorney General
Office of the Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324-5346
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether low level government employees whose duty it is to provide factual information to their superiors have a derivative privilege (arising out of the executive immunity privilege) whereby the low level employees have absolute immunity for malicious defamatory statements made or repeated by them to the press.

2. Whether an independent research scientist becomes a limited purpose public figure by undertaking a product safety study which is or later becomes a public controversy.

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JURISDICTION

The unpublished Opinion of the California Court of Appeal under review here is dated March 19, 1996. A Petition for Rehearing was filed and an opinion issued on April 18, 1996. A Petition for Review to the Supreme Court of California was filed and was denied on July 17, 1996. Petitioners claim jurisdiction under 28 U.S.C. §1257.

CONSTITUTION AND STATUTES INVOLVED

Petitioners have set forth the following constitutional provisions as being involved in this case.

1. The First Amendment to the Constitution of the United States.

2. The Fourteenth Amendment, §1, cl.2, to the Constitution of the United States.

3. The "Executive Immunity Privilege" as established by law.

STATEMENT OF THE CASE

This case arises from a press release issued on February 22, 1989 by the Director of the California Department of Food and Agriculture which contained information that Petitioner Baugher alleges was defamatory to him and to his company, Petitioner Orius Associates, Inc.[1] The

[1] Respondent State of California has consistently maintained that the information contained in the press release

press release criticized "researchers" and "scientists" who were involved with a human exposure study but did not specifically name any individual. All parties agree that the press release was privileged under the California Civil Code, Section 47, subdivision (a), which has been held by the California Courts to provide an absolute privilege for individuals at high levels in California state government who issue statements in the "proper discharge of an official duty". In response to media inquiries about the privileged press release, an information officer for CDFA confirmed that Petitioners were among the researchers and scientists to which the press release referred.

Petitioners allege on page 3 of their Petition that the California Court of Appeal extended the federal "executive privilege" doctrine, akin to that set forth in *Barr v. Mateo* (1959) 360 U.S. 564, to the information officer, a "low level" state employee. That is an incorrect reading of the decision of the appellate decision. The Court of Appeal simply held that when the absolute privilege set forth in Code Section 47, subdivision (a) of the California Civil Code is applicable to information released by a department director or equivalent in state government, one may not circumvent the statute by suing the lower level employees who provided the information to the person covered by the privilege. The Court held that

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was wholly truthful; however, the truth or falsity of that information is irrelevant for the purpose of this Petition.

these lower level employees are protected by a "derivative privilege". (See page 28 of the Appendix, hereinafter "App."). The court did not apply the derivative privilege to the information officer who released the *additional* information. On the contrary, the Court of Appeal, after determining that the petitioner was a limited purpose public figure, examined whether the information officer was liable. (App. 34.)

The Court looked solely at the additional information provided by the information officer and found it to be true.[2] Once the determination was made that the only information imparted in an unprivileged publication was true, it became irrelevant whether the Petitioner was a limited purpose public figure or not. Absent falsity, there can be no malice.

The California Court of Appeal conducted a de novo review of the record of the four week trial in this case. Its decision is attached to the Petition before this court as Appendix A. The "Facts and Procedural Background" set forth in that decision on pages 3 through 15 of the Appendix to the Petition for Writ of Certiorari, while not all-inclusive, is accurate and is hereby adopted as respondent's statement for the purpose of the opposition of the petition.

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[2] The Court also found that any defamatory sting would have been felt at the publication of the privileged press release because the number of researchers and scientists involved with the study under discussion was small and easily discernible. The identification of the Petitioners by name did not change the impact of the information in the press release. (App. 32 and 33.)

Pursuant to The Rules of the Supreme Court of the United States, Rule 15.2, a brief in opposition to a petition for writ of certiorari "should address any perceived misstatements of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Respondent State of California hereinbelow addresses the significant legal and factual misrepresentations set forth in the Petition.

1. Misstatements of Law

Petitioners frame this case as if the decision of the California Court of Appeal had extended the federal "Executive Immunity Privilege" to "low level" employees of the State of California. In fact, the holding in this case hinges on a California statute, Section 47, subdivision (a) of the California Civil Code which states in pertinent part: "A privileged publication is one made: (a) In the proper discharge of an official duty. (b). . . . ." At no point in the litigation was it argued by any party that any law or holding other than Section 47, subdivision (a) of the California Civil Code was involved in establishing the privilege for the press release.[3]

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[3] As noted by the California Court of Appeal on page 17 of the Appendix, petitioners *conceded* that the privilege set forth in Section 47, subdivision (a) was applicable to the press release because it had been approved at a sufficient level in the hierarchy of state government to render them privileged.

2. Misstatements of Facts

Petitioners have made a number of factual statements which Respondent perceives to be misstatements of fact.[4] Respondent does not believe that all of these statements will necessarily impact an issue that would be before the Court if certiorari were granted but, out of an abundance of caution, the following misstatements are noted:

Petitioners state that one of the statements made in the press release was that Petitioner Baugher acted criminally. That allegation was not before any of the Courts below. The Petitioners raised only four instances of allegedly defamatory statements in their Complaint and only they were litigated.[5] Petitioners may not raise now the issue of additional defamatory language.

Petitioner Baugher claims that he designed and conducted a study which proved the pesticide "Zolone" to be harmful and dangerous. He alleges that this finding

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[4] A comparison of the facts as recorded in the appellate decision with those set forth in the Petition will reveal numerous inconsistencies. Respondent will not comment on all of the inconsistencies here. Suffice it to state that to the extent Petitioners wander from the facts set forth in the appellate decision, Respondent objects on the basis that such wandering is ipso facto, a misstatement of fact.

[5] The four statements that were alleged in the complaint to be defamatory and were thereafter litigated are: 1. The plaintiffs violated CDFA approved procedures; 2. The plaintiffs exposed study participants to excessive levels of the pesticide phosalone; 3. The plaintiffs committed violations of professional ethics; and; 4. The plaintiffs seriously breached a position of trust with the CDFA.

caused low level employees of the CDFA to be displeased. In fact, CDFA had required that Zolone be removed from the market for all hand-harvested crops in California because of the Department's belief that it was dangerous. Petitioners were hired by Zolone's manufacturer, Rhone-Poulenc Agricultural Chemical Co. (hereinafter "Rhone-Poulenc"), to attempt to prove that Zolone was safe for hand-harvested crops. The study, instead, corroborated the opinion of CDFA. The only anger on the part of CDFA employees at the Petitioners was because workers in the study were exposed to more of the chemical than was allowable in the protocol for the study approved by CDFA.

Petitioners claim that the study harmed no one. In fact, nineteen workers remained in the study after their blood tests had exceeded trigger points in the medical monitoring portion of the protocol which required their removal. Petitioner Baugher's own handwritten field notes indicated that some workers were suffering symptoms that were consistent with organophosphate poisoning.

Contrary to the assertion of the petitioners on page 9 of the Petition, there was no evidence adduced at trial that Dr. Baugher was hired by Rhone-Poulenc "precisely because he would not attempt to influence the study outcome in any way to help Rhone-Poulenc . . . ".

Petitioners allege that when Dr. Baugher was contacted and retained to do the study in April 1988, there was no public controversy or public interest in the study. In fact, petitioners conceded at trial that a public controversy had existed prior to his retention.

Petitioners allege that Dr. Baugher was a recognized expert in the toxicity of insecticides to humans. In fact, Dr. Baugher held no medical degree. His Ph.D. was in entomology. He testified that he had never personally observed a case of organophosphate poisoning with the possible exception of some symptoms that he, himself, had once suffered.

Petitioners state that CDFA neither approved nor disapproved the study protocol. In fact, CDFA put on extensive evidence that the experimental human subjects study would not have been allowed in the absence of their approval. Zolone could not have even been applied to grapes in California in the absence of approval. The proposed protocol for the study was amended several times until the conditions required by CDFA were incorporated. In the absence of the amendments, CDFA would not have allowed the study to go forward.

Petitioners allege that when the final report was submitted, the press had no interest in the study. In fact, the information officer testified that from the time that the field portion of the study concluded in the summer of 1988, she continued to get media inquiries regarding what conclusions had been reached on the basis of the data gathered in the field. These inquiries were one of the reasons why the press release was prepared.

Footnote 1 of the Petition is potentially misleading. Depressions of 25% or more of an individual's plasma cholinesterase are *not* clinically insignificant. Depressions of 25% or more are beyond natural variation and, in the presence of organophosphates, assumed to be as a result of the organophosphate exposure.

Petitioners assertion that there was an abundance of circumstantial evidence that both Dr. Krieger and James Wells had the motivation and intention to ruin Dr. Baugher and his business is simply false.

REASONS FOR DENYING THE WRIT

I. Petitioners Have Failed to Set Forth Adequate Jurisdiction as to the First Question.

The first question posed by the petitioners does not fall within the parameters of 28 U.S.C. §1257. The decision of the Court of Appeal simply ruled on the reach of a state statute. At no time did any party argue that any other statute or other established right was implicated in the decision as to whether the press release was privileged. The privilege was squarely predicated on the California statute, Section 47, subdivision (a) of the California Civil Code, and the California case law thereunder.[6] The petitioners did not argue that the statute was invalid nor raise an issue regarding "any title right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States" related to the privileged press release.

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[6] The Appellate Court followed the analysis set forth in the California Supreme Court case of *Saroyan v. Barkett* (1962) 57 Cal.2d 706.

II. The Second Question is Moot.

The second question posed relates to whether or not the Petitioners were limited purpose public figures as delineated in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 and its progeny. The trial court decided on the evidence before it that petitioner Baugher was a limited purpose public figure. The appellate court made a de novo review of that determination pursuant to the petitioners' protective cross-appeal and also found that the petitioner Baugher was a limited purpose public figure which required malice to be proven. Respondent adopts the analysis set forth on pages 20 through 26 of the Appendix and incorporates it by reference.

The determination by the Court of Appeal that Petitioner Baugher was a limited purpose public figure is, however, moot for the purposes of this case. The Court of Appeal limited the inquiry of malice to the information officer as stated above. The Court then noted that the only information imparted by Ms. Federeghi was *true*. Once that determination was made, it became irrelevant whether petitioner Baugher was a limited purpose public figure or not. Although the respondents believe that the Court appropriately applied the precedential cases, the outcome of this case would not change even if petitioner Baugher were found not to be within the parameters of a limited purpose public figure. Truth defeats the cause of action regardless of the status of the petitioner.

CONCLUSION

There is no jurisdiction over the threshold question in this case. The Court of Appeal merely ruled on the applicability of a privilege pursuant to a California statute and the truth of an unprivileged utterance. The only possible jurisdiction would be over the question of whether Petitioner Baugher is a limited purpose public figure for the purpose of this case. Changing the analysis of whether Petitioner Baugher is a limited purpose public figure will not effect the outcome in this case whatsoever because of the determination that the only unprivileged statements were truthful. Even if this Court were to disagree in any way with the analysis in this case regarding limited purpose public figure status, there is no important or compelling reason to correct it in this unpublished California case.

CORINNE LEE MURPHY
Deputy Attorney General
Office of the Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324-5346